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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 31 2006

EAC 03 136 52820

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a research fellow at Harvard Medical School. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services (CIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The petitioner describes his work:

> Because of my extraordinary background in both medical science and computer science, I was immediately recruited to [redacted] Lab of Department of Molecular Genetics as a bioinformatics associate. . . . I was involved in developing new technology to facilitate the genome sequencing and became [one of the] key people in [the] Human Genome Project. . . . I was offered new positions as the research fellow in bioinformatics in [redacted] lab and Brigham & Women's Hospital and [redacted] bioinformatics for the Microarray Facility of HPCGG [Harvard Medical School – Partners Healthcare System Center for Genetics and Genomics]. . . . My research interests in Harvard Medical School and HPCGG focus on studying human cancers/diseases by examining alteration of gene expression profiles in human tumors/patients samples by using high-throughput microarray technology. . . .
>
> I have developed some sophisticated bioinformatics tools. . . . These tools are being used by many scientists all over the world and have saved biologists a lot of time in Microarray data analysis. Therefore, my works have greatly sped up the functional genomics research in human cancers.

The petitioner offers two mutually exclusive arguments in support of his waiver claim. First, he states that he is "highly sought after" and needs "the maximum flexibility" "to pursue more meritorious research projects." The petitioner also asserts that he could not meet the job offer requirement because "the Harvard Medical

School (HMS) is unable to offer a permanent position to me." Then, having stated that he cannot remain at Harvard and should be free to change jobs at will, he argues that he should receive the waiver because he is "indispensable to the HMS. . . . It would cost the HMS an enormous amount of time and resources to train another scientist to replace me."

The petitioner asserts that his published articles "have been cited by many world-wide scientists." The petitioner submits a list of 19 citations. No source for the list is identified. This list, therefore, amounts to a claim rather than corroboration of that claim.

Several witness letters accompany the petition. We shall consider examples of these letters here. [redacted] who supervised the petitioner's work at Albert Einstein College of Medicine and, later, at Harvard, states that the petitioner "would be very difficult to replace," owing to a "shortage of personnel." A labor shortage is not grounds for a waiver, because labor certification is the process by which the Department of Labor verifies that such a shortage exists. *See Matter of New York State Dept. of Transportation* at 218. More important is consideration of the merits of the petitioner's work.

[redacted] states that the petitioner "has developed some Microarray data analysis programs that not only speed up the process of massive Microarray data [analysis], but also greatly improve the data reliability and accuracy." [redacted] the petitioner "one of [the] key persons in this project of high national interest."

[redacted] of Albert Einstein College of Medicine describes the petitioner's doctoral studies under [redacted] supervision:

> [The petitioner] successfully developed a system to study in vivo interaction between T cells and their antigenic targets. Using this unique transgenic mouse system, [the petitioner] discovered many molecular features of the interaction between T cell receptor (TCR) and its ligand, peptide/MHC complex. Because TCR-peptide/MHC interaction is the central event of cellular immune response, discovery of the important features of this interaction significantly advanced our understanding of how the immune system (T cell immunity) distinguishes foreign pathogens from our own cells and how T cells recognize and then kill these pathogens. I am sure that such a discovery will accelerate our process of developing effective treatments for many human diseases, and thus greatly benefit the United States.

Most of the initial witnesses are on the faculties of Harvard Medical School or Albert Einstein College of Medicine. [redacted] now at the University of Texas, was previously an associate professor at Harvard, but left that university in 1998, three years before the arrival of the petitioner and [redacted]

> [The petitioner] used his extraordinary skills in molecular biology to successfully develop . . . an extremely powerful tool to reveal the structure-function relationship of TCRs. . . . Such [a] discovery has very important clinical implications in that cellular immune response represents

> a human major defense against virus-infected and tumor cells and plays a critical role in transplantation rejection and autoimmune diseases. . . .
>
> [At Harvard, the petitioner's] research interest focus on studying the gene expression regulation in human cancers by using cutting-edge Microarray technology . . . which allow[s] the monitoring of expression levels for thousands of genes simultaneously. . . . By applying these tools to several human cancer/disease projects, [the petitioner] has identified some unique expression profiles in human tumor samples compared to normal tissues. [The petitioner's] novel findings provide important clues to reveal the mechanisms of development of human cancers.

On April 27, 2005, the director issued a request for evidence, instructing the petitioner to submit additional evidence to establish that the petitioner meets the guidelines set forth in *Matter of New York State Dept. of Transportation*. The director stated that independent, objective evidence (such as documentation of citations) carries greater weight than the claims of witnesses whom the petitioner has selected. The director observed that the petitioner "has since accepted a position with another institution," which nullifies the argument that he should receive a waiver because he is "indispensable to the HMS."

In response, the petitioner several more witness letters and additional documentary evidence. Many of the new letters discuss the petitioner's new position as a research assistant professor and director of the Bioinformatics Laboratory at Mount Sinai School of Medicine, a position the petitioner assumed in August 2004, over a year after the petition's March 2003 filing date. This information shows that the petitioner continues to be active in the general field for which he seeks a waiver; [redacted] attests, in a new letter, to the value of the petitioner's most recent work. We will not discuss this work in detail, however, because a finding of eligibility cannot rest on work that began after the filing date. *See Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), which require that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. Suffice it to say that the petitioner's contributions to his field did not cease when he left Harvard in 2004.

[redacted] Bioinformatics at the Columbia University Genome Center, states that the petitioner "is currently placed at the very forefront of this discipline." [redacted]t the petitioner's work has made "Microarray analysis . . . an even more powerful approach to profile the gene expression of human diseases." [redacted] head of the Transgenic Oncogenesis Group at the National Cancer Institute, states that the petitioner's "achievements in medical research are remarkable." [redacted] on to describe work done by the petitioner both before and after the filing date. Also praising the petitioner's career achievements is Nobel [redacted] of St. Jude Research Hospital. [redacted] not delve into the same degree of technical detail as some other witnesses, but he makes it clear nevertheless that he is familiar with the petitioner's research.

The petitioner submits printouts from a citation database, showing that eight of the petitioner's articles have been cited an aggregate total of 132 times; the most-cited article has 42 citations. This material directly addresses the director's request for evidence of heavy citation of the petitioner's published work.

The director denied the petition on August 26, 2005. The director acknowledged the petitioner's supplemental submission, but noted that much of the new evidence concerned work that the petitioner undertook after the filing date. The director mentioned the petitioner's submission of "a citation index," but elsewhere in the decision the director stated: "The record contains insufficient evidence that others have cited the beneficiary's work to a degree that would be indicative of his claimed accomplishments in the field."

On appeal, counsel argues that the director did not give sufficient consideration to evidence that relates to the petitioner's work prior to the filing date. Counsel also observes that articles by the petitioner, published before the filing date, have been heavily cited. The petitioner states that prominent witnesses, such [redacted] who are neither the petitioner's friends nor his collaborators, have attested to the significance of the petitioner's past and present work.

We agree with many of the arguments offered by counsel and the petitioner. The director had issued an unusually detailed and thorough request for evidence, which provided the petitioner with an excellent opportunity to supplement the record. When the petitioner took advantage of this opportunity, however, the director did not give full consideration to the materials offered in response. Perhaps the starkest example of this is the director's contradictory statements as to whether or not the petitioner had documented citation of his published work. The director was correct to state that a petition filed in 2003 cannot be approved based on work done in 2004 and 2005, and many of the director's assertions are correct as matters of general principle; it is their application in this particular case that is questionable.

We find that the petitioner's response to the director's request for evidence sufficed to establish eligibility, and that the director should have approved the petition at that time. We therefore reverse the director's finding of ineligibility.

It does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given field of research, rather than on the merits of the individual alien. That being said, the evidence in the record establishes that the scientific community recognizes the significance of this petitioner's research rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.